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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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1 **I. INTRODUCTION**

2 Aeroflex's *ex parte* motion asks this Court to decide the issue presented in Ricoh's
 3 motion for sanctions: whether the Aeroflex Defendants and their counsel have engaged in a fraud
 4 upon the Court by their conscious disregard of Judge Jenkins' explicit instructions during the July
 5 14, 2005 Case Management Conference to research, prepare and serve within one month detailed
 6 declarations that would define the scope of discovery and trial. The allegedly privileged document is
 7 dated July 15, 2005 – the day after the CMC – and illustrates how Defendants never intended to
 8 comply with the Court's Order. Ricoh only learned of the fraud months later. These facts are laid
 9 out in Ricoh's Motion for Sanctions. If the Court finds that Defendants deliberately engaged in a
 10 pattern to misrepresented the number and identification of ASICs at issue (and it is indisputable that
 11 Defendants have failed to disclose all of the ASICs as required by Judge Jenkins), then any claim to
 12 privilege fails. To resolve the questions of privilege, then, the Court must also resolve the basis for
 13 the sanctions motion. Aeroflex apparently is hoping that, if it succeeds in getting the allegedly
 14 privileged email prematurely removed, then at least part of the direct evidence of its willful
 15 noncompliance will be re-cloaked in privilege, and all this Court will be left to do is make inferences
 16 from circumstantial evidence.

17 There is also a question of whether the entire email is properly the subject of a privilege
 18 claim. The email – attached as Exhibit 1 to the declaration in support of the sanctions motion – is
 19 five pages long and, after the first email exchange with Ms. Fink, contains several other subsequent
 20 exchanges between and among engineers at Aeroflex on the identification of certain design libraries,
 21 whether certain ASICs were synthesized using the various Synopsys products identified by the
 22 parties, and the names of persons who were involved in working on those ASICs. This information
 23 is all relevant, and *none of it is privileged* because it is neither attorney work product or
 24 communications between attorney and client – instead, it is communications between Aeroflex
 25 employees about how certain chips were made, and who worked on them. That the discussion may
 26 have been triggered by an inquiry from attorney does not mean that all subsequent internal
 27

1 communications about factual matters are cloaked by the privilege. *In re: Sealed Case*, 737 F.2d 94,
 2 99 (D.C. Cir. 1984) (no privilege for internal factual discussions). Indeed, Aeroflex's corporate
 3 designees were allowed by their counsel to testify about the same facts that are referenced in the
 4 allegedly privileged email. Thus, even if any privilege was not already abrogated by the fraudulent
 5 conduct, any such privilege was waived during the depositions when Aeroflex's counsel allowed
 6 their witnesses to answer questions on the subject matter of the emails.

7 The other emails that Aeroflex has demanded be returned fall into the same category.
 8 Most appear to start with the incriminating email from Ms. Fink, and are followed by a string of
 9 internal communications identifying who worked on a particular project, or when or how the ASIC
 10 was created, or what technical library was used. If the Court requests it, Ricoh will submit them for
 11 inspection, but the underlying issue is the same as the specific email at issue. Either the Fink email
 12 is not privileged, for example because it is evidence of a fraud on the Court, or the privilege has been
 13 waived, or the assertion of privilege will be sustained. The other internal communications should
 14 never have been swept under the privilege rug, however.

15 To accommodate the Howrey firm's partners retreat in the Cayman Islands, the parties
 16 had agreed to reschedule the sanctions motion to April 4 (Defendants have noticed another motion in
 17 this case for April 4). Now that Judge Jenkins has referred Ricoh's sanctions motion to this Court
 18 for decision, the hearing has been rescheduled to April 19. Ricoh suggests that this *ex parte* motion
 19 be combined with the merits of the sanctions motion, and heard either on April 4, when all counsel
 20 will be in town, or on April 19, when the merits of the sanctions motion will be addressed.

21 **II. FACTUAL BACKGROUND**

22 As much as Aeroflex would like to separate it, the issue of whether the Fink email is
 23 privileged is inextricably interwoven with the merits of Ricoh's sanctions motion. A brief summary
 24 of that motion follows, along with some corrections to the events recounted in the *ex parte* motion.

25 **A. The Fink Email And Its Relationship To The Sanctions Motion**

26 At the July 14 CMC, Judge Jenkins explicitly instructed that the Aeroflex Defendants had

1 to submit sworn declarations identifying *all* of the Defendants' commercial ASICs designed using
 2 the identified Synopsys products, to identify all of the technical libraries that each Defendant had
 3 used in conjunction with any of the Synopsys products, and to identify *all* of the ASIC chips that
 4 each Defendant had designed using those Synopsys products. During the CMC, counsel for the
 5 Aeroflex Defendants and Synopsys opined that it would be difficult to get a corporate officer to
 6 swear to the accuracy of such declarations. Judge Jenkins, however, explicitly warned counsel that
 7 those declarations were to be sworn under the penalty of perjury, and that if the declarations were
 8 incomplete or misleading, sanctions would follow.¹

9 There is no question that, instead of conducting a comprehensive review of their technical
 10 libraries and ASIC chips, Aeroflex and the other Defendants only conducted a limited survey of their
 11 libraries and ASICs. The Fink declaration is strong evidence that the Defendants intentionally
 12 limited their search for and collection of data, but it is not the only evidence. As set forth in the
 13 sanctions motion, each of the Defendants have been forced to revise on multiple occasions their
 14 respective declarations, increasing the total number of ASICs from about 60 to more than 200.
 15 Aeroflex's corporate designees identified additional relevant ASICs that were not included on any of
 16 its declarations. Remarkably, just days ago, Aeroflex submitted still another product declaration (its
 17 fourth), and still managed to omit relevant products that had been identified by its designees!
 18 (Brothers Dec. ¶ 2). Ricoh's motion also explains (at p. 7) how a designee for another Defendant
 19 (AMI Semiconductor) admitted that there were additional ASICs that he wanted to list on his
 20 declaration, but was forbidden by Ms. Fink from doing so.

21 There is no serious question that the initial declarations, submitted under oath and under
 22 threat of sanctions from Judge Jenkins, were woefully incomplete. Ricoh's sanctions motion shows
 23 how, instead of running to Court with complaints, Ricoh patiently and repeatedly negotiated to get
 24 the most complete version of the declarations, and all of the subsequent discovery that was driven by
 25

26 ¹ All of the ASIC Defendants have repeatedly changed these declarations. Aeroflex has issued four versions of the
 27 declarations, and they are still incomplete. The ASIC Defendants also delayed for as long as three (3) months in
 serving one of these declarations and two (2) months on another. See Ricoh's motion for sanctions. at pp. 8, 14.

1 those declarations. It was only when the Aeroflex and AMI Rule 30(b)(6) depositions commenced
 2 in January and February 2006 that Ricoh discovered how incomplete and misleading the declarations
 3 really were. The Fink email confirmed that this was not an inadvertent error, but part of a pattern of
 4 willful deception.

5 **B. The Rest Of The Story Behind The *Ex Parte* Motion**

6 Aeroflex's papers have several inaccuracies. For example:

7 **The slow pace of Defendants' document production.** At the CMC conference,
 8 Synopsys and the Aeroflex Defendants represented that they need about six weeks to produce the
 9 bulk of their documents, or in other words by the end of August. Judge Jenkins established a pretrial
 10 schedule on July 22, 2005 based upon that prediction. (D.I. 242). By late August, however,
 11 virtually no documents had been produced, and Defendants eventually committed that their
 12 document would be substantially complete by October 7, 2005. They missed that date, too, forcing
 13 the parties to stipulate to a new pretrial and trial schedule, which was entered on November 22,
 14 2005. (D.I. 279). Defendants thereafter continued to produce documents, and in fact, they have not
 15 yet completed their production of documents, and refuse to say when their document production will
 16 be substantially complete. (Brothers Dec. ¶ 3).

17 From time to time between December 2005 and the present, Defendants have produced
 18 large volumes of emails in electronic form. Ricoh believes that the Fink email at issue was produced
 19 in either December 2005 or January 2006. It did not come to the attention of Ricoh's attorneys until
 20 some time thereafter, and only after Ricoh suspected that Aeroflex and the other Defendants had
 21 engaged in a scheme to conceal technical libraries and ASICS from disclosure. (Brothers Dec. ¶ 4).
 22 The Fink email explains why the library declarations, and the subsequent product declarations, were
 23 so wrong. The Fink email appeared –and still appears – to confirm Ricoh's suspicions that this was
 24 more than a simple misunderstanding of Judge Jenkins' explicit instructions, as Aeroflex now claims
 25 in its motion.

26 **Defendants' inconsistent positions regarding the return of privileged documents.**

1 Aeroflex glosses over the fact that, for nearly two years in this litigation, it and the rest of the
 2 Defendants took the position that they would not return privileged documents inadvertently
 3 produced by Ricoh unless Ricoh first produced a detailed declaration explaining why the documents
 4 were privileged. (Brothers Dec. Ex. 1, Moller May 18, 2004 Ltr. to Brothers). In October 2005,
 5 Defendants produced privileged documents and later requested their return. (Brothers Dec. Ex. 2,
 6 Fink October 17, 2005 Ltr. to Brothers). Much to the Defendants' irritation, Ricoh requested a
 7 detailed declaration explaining why the documents were privileged, holding them to the same
 8 standards they had imposed upon Ricoh. (Brothers Dec. Ex. 3, Hoffman October 21, 2005 Ltr. to
 9 Fink). Only then did Defendants concede that under paragraph 21(b) of the Protective Order, no
 10 such detailed declaration would be required. (Brothers Dec. Ex. 4, De Mory October 24, 2005 Ltr.
 11 to Hoffman; *Id.* Ex. 5, Hoffman October 25, 2005 Ltr. to De Mory). Defendants' citation to Mr.
 12 Hoffman's letter of November 1, 2005 (DeMory Dec., Ex. 6) thus refers to *Defendants'* repudiation
 13 of their long-standing insistence of a detailed declaration under Paragraph 21(b) of the Protective
 14 Order.

15 **Ricoh has presented the privilege issue to the Court, consistent with the Protective
 16 Order.** Ricoh's position has been, and continues to be, that allegedly privileged documents
 17 inadvertently produced should either be promptly returned upon request, or the issue should be
 18 immediately presented to the Court. This position is consistent with the Protective Order:

19 (b) In the event that any privileged attorney-client or work product documents or things
 20 are inadvertently produced for inspection and/or provided, the disclosing party shall
 21 identify such documents or things within five (5) days of when it discovers that the
 22 privileged materials were inadvertently produced for inspection and/or provided, and
 23 either (1) copies shall not be provided, or (2) if copies have already been provided, all
 24 copies in the receiving party's possession shall be promptly returned (and not relied
 25 upon) by the receiving party. *Nothing in this paragraph shall prevent the receiving party
 26 from contending that the identified materials are not privileged, that the material was not
 27 inadvertently produced, or that privilege was waived for reasons other than the mere
 28 inadvertent production of the material.* (emphasis added).

By the time that Aeroflex had requested the return of the allegedly privileged document, Ricoh
 already had presented the issue to the Court. Ricoh's action thus was and is consistent with the last

1 sentence of paragraph 21(b), which by its “nothing in this paragraph shall prevent” provision
 2 expressly permits Ricoh to present the issue to the Court. The allegedly privileged document has
 3 been submitted to the Court in a sealed pleading. The question of privilege is coterminous with the
 4 issue in the sanctions motion. Ricoh’s submission of the document is not only consistent with the
 5 Protective Order, but was required by its counsel’s obligation to zealously represent their client’s
 6 interest, and to prevent a fraud upon the Court.

7 **Aeroflex misquotes the email footer.** Aeroflex misquotes the language of the Fink
 8 email, contending that it contains “a very clear ‘attorney-client privileged’ footer.” No such
 9 language exists in the email. The email string does contain a footer which reads “This email and any
 10 attachment contain information from the law firm of Howrey LLP, which *may* be confidential and/or
 11 privileged,” but for Aeroflex to claim that this boilerplate, conditional statement constitutes an
 12 invocation of privilege (and by extension invoking privilege on virtually every email sent through
 13 the firm) is not plausible. Nevertheless, Ricoh suspected that the Defendants would try to divert the
 14 Court’s attention away from the merits, so Ricoh’s motion included, in footnote 2, an explanation of
 15 why the document was not privileged, and why any potential privilege had been waived.

16 **Aeroflex distorts the record regarding privilege logs.** Aeroflex also presents an
 17 incomplete background with respect to the exchange of privilege logs. Throughout this litigation,
 18 Ricoh has sought to establish the terms and conditions for the exchange of privilege logs. This issue
 19 was actually presented in the April 23, 2004 discovery plans submitted by each party (D.I. 117, at 3-
 20 4; D.I. 118, at 5-6), but the Court’s discovery stay two weeks later put all such discussions on hold.
 21 After the claim construction was issued, Ricoh again raised the issue of privilege logs in the June 8,
 22 2005 CMC statement (D.I. 234, at p. 30), but Defendants ignored the issue, and also rebuffed
 23 Ricoh’s attempts to raise the issue for the rest of 2005. Only in the past few weeks have the parties
 24 agreed in principle to exchange privilege logs, although Defendants have yet to identify a date.
 25 (Brothers Dec. ¶ 5). Contrary to Aeroflex’s characterization of the January 17, 2006 letter from Mr.
 26 Brothers (DeMory Dec. Ex. 7), that letter does not reference privilege logs, but instead refers to the
 27

1 promised resumption of a deposition (which has yet to be scheduled). The letter draws a clear
 2 distinction between discovery of post-litigation facts relating to the '432 patent (such as the
 3 identification of the relevant libraries or ASICs), for which no privilege would be claimed, and
 4 privileged communications in which the privilege would be asserted. Most if not all of the Fink
 5 email appears to fall into the former category, for it discusses objective facts relating to the
 6 identification of the libraries and ASICs at issue.

7 **III. ARGUMENT**

8 **A. The Law Of Privilege**

9 Attorney-client privilege only protects communications that "rest on confidential
 10 information obtained from the client" and not merely "when an attorney conveys to his client facts
 11 acquired from other persons or sources." *In re: Sealed Case*, 737 F.2d 94, 99 (D.C. Cir.
 12 1984)(quoting *Brinton v. Dept. of State*, 636 F.2d 600, 604 (D.C. Cir. 1980). Even if a document is
 13 privileged, the privilege may be waived "if the privilege holder fails to pursue all reasonable means
 14 of preserving the confidentiality of the privileged matter." *United States v. De La Jara*, 973 F2d
 15 746, 750 (9th Cir. 1992); *see also Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179, 183 (N.D.
 16 Cal. 1990) (privilege was waived because of failure to claim privilege for six weeks following
 17 disclosure and failure to take reasonable precautions against disclosure).

18 Neither of the two cases cited by Aeroflex are applicable to the facts at issue here. *State
 19 Compensation Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 648 (Cal. Ct. App. 1999), related to an
 20 extreme case in which documents were clearly marked as "Attorney-Client
 21 Communication/Attorney Work Product," followed by "Do Not Circulate or Duplicate." These
 22 clearly marked documents were then passed on to an expert witness who forwarded them along to a
 23 firm that was adverse to the producing party in another matter. *Id.* at 648-9. This is not the case
 24 here, where no such definitive identification of the materials exist. The closest thing to such a
 25 statement is the equivocal footer, but even that footer cannot salvage a privilege which is otherwise
 26 waived, which, as shown below, is the case here.

1 *U.S. v. Derr*, 1993 U.S. Dist. LEXIS 11414, *3-4 (N.D. Cal. 1993), likewise does not
 2 apply. There, the Defendant “made substantial efforts to prevent the disclosure of privileged
 3 documents.” *Id.* In contrast, the record in this case reflects Defendants’ sloppy disclosure
 4 procedures that have resulted in multiple delays. In some cases, entire production batches later have
 5 been recalled by Defendant’s counsel in order to perform costly and time consuming post hoc
 6 privilege review. For example, a production of email to an outside vendor was delayed for weeks
 7 while Defendants’ counsel had the vendor manually extricate privileged material from the
 8 production, delaying availability of email for some deponents until after their scheduled depositions.
 9 (Brothers Dec. ¶ 6).

10 **B. The Fink Email Is Not Privileged**

11 **1. An Attorney’s Transmission Of An Order Is Not Privileged**

12 “When an attorney conveys to his client facts acquired from other persons or sources,
 13 those facts are not privileged.” *In re: Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (quoting
 14 *Brinton v. Dept. of State*, 636 F.2d 600, 604 (D.C. Cir. 1980). Here, the email at issue simply relays
 15 the courts instructions, albeit incorrectly, to the client. There is no basis for concluding that the
 16 contents of the email “rest[] on confidential information obtained from the client.” To the contrary,
 17 this email is simply instructing the client of the content of the CMC order. “It remains the
 18 claimant’s burden . . . to present to the court sufficient facts to establish the privilege.” *Id.* Aeroflex
 19 has filed to meet that burden here.

20 **2. The Email Contains Factual Information Not Subject To A Privilege
 21 Claim**

22 The email consists of a discussion between and among Aeroflex engineers that is purely
 23 factual information that is not subject to a proper privilege claim. The identification of technical
 24 libraries, ASICs, and who worked on those projects, are in no way protected from discovery. The
 25 fact that the discussion may have been triggered by an email from an attorney does not change this
 26 fact. *In re: Sealed Case*, 737 F.2d at 99 (“The privilege applies only if . . . the communication
 27
 28

1 relates to a fact of which the attorney was informed (a) by his client (b) without the presence of
 2 strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or
 3 (iii) assistance on some legal proceeding and not (d) for the purpose of committing a crime or tort").
 4 Here, the email identifies certain technical libraries and products, identifies who was involved on
 5 those projects, and other factual information that is not subject to a proper claim of privilege.
 6 Ironically, less than a month ago, defendants asserted that "technical information communicated to
 7 an attorney for completing a patent application" and "relevant underlying facts, data or information"
 8 in communications between the inventor and the prosecuting attorney of the '432 patent are not
 9 privileged. (Brothers Dec. Ex. 6, De Mory February 21, 2006 Ltr. to Brothers). Although the law
 10 with respect to prosecution history is controlled by Federal Circuit precedent is not directly
 11 applicable here, the fact that Defendants have demanded Ricoh produce all "relevant underlying
 12 facts, data or information" while simultaneously refusing to disclose "relevant underlying facts, data
 13 or information" shows that Defendants' arguments are manufactured.

14 **3. Evidence of a Fraud on the Court is not Privileged.**

15 A document evidencing an ongoing fraud on the Court is not protected by attorney-client
 16 or work product privilege, even if it would otherwise qualify as privileged. *Gutter v. E.I. DuPont de*
Nemours, 124 F. Supp. 1291, 1316-17 (S.D. Fla. 2000) (Plaintiff "established a prima facie case that
 18 DuPont had intentionally committed discovery fraud upon the court and that the crime/fraud
 19 exception should be applied to vitiate DuPont's claim of attorney-client and work product
 20 privilege."); *see also Cunningham v. Connecticut Mutual Life Ins* 845 F.Supp. 1403 (S.D.Ca. 1994)
 21 (privilege did not apply under the crime-fraud exception and was waived in any case because it was
 22 not properly asserted). In *Gutter*, defendant DuPont "engaged in fraud and intentional misconduct
 23 which abused the judicial process" by improperly asserting work product privilege regarding
 24 documents which included "evidence of SU contamination that DuPont had in its possession and that
 25 the district court had ordered it to produce." 124 F. Supp. at 1296-97. Here, the email in question is
 26 a specific instruction to the client to omit from its sworn declarations products that are clearly
 27

1 covered by the Court's CMC order. This represents a direct violation of the Court's instructions and
 2 is a naked attempt to avoid discovery of relevant products and mislead the Court.

3 **C. Even If The Fink Email Was Privileged, The Privilege Has Been Waived**

4 When Ricoh filed its motion for sanctions, it noted that the email in question was
 5 voluntarily produced by Aeroflex in part to explain how the various Aeroflex libraries were selected.
 6 Defendants do not dispute that they voluntarily produced the email, but now claim it was
 7 inadvertently produced. The content of the email, however, directly relates to the identification of
 8 the technical libraries and ASICs at issue, reasonably leading Ricoh to conclude that the production
 9 was part of Aeroflex's far larger response to Ricoh's requests.

10 Tellingly, Aeroflex's corporate designees testified about the facts contained in the email,
 11 as set forth in Ricoh's sanctions motion at p. 9-11. Even assuming the substance of the email
 12 concerning the identification of libraries and ASICs was privileged, the failure to protect that
 13 privilege at deposition is a failure to "preserv[e] the confidentiality of the [allegedly] privileged
 14 matter." *United States v. De La Jara*, 973 F.2d 746, 750 (9th Cir. 1992). Thus, any claim of
 15 privilege was waived both by the voluntary production of the document, and because it reflects a
 16 possible fraud upon the Court. *See, e.g., Gutter*, 124 F. Supp. at 1316-17; *Bud Antle*, 131 F.R.D. at
 17 183-184.²

18 **IV. CONCLUSION**

19 For the reasons set forth above, Ricoh respectfully requests that the Court deny the *ex*
 20 *parte* motion, or alternatively set the matter for hearing on the same date as the hearing on Ricoh's
 21 motion for sanctions, on April 19, 2006.

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 24
 25
 26 ² The crime-fraud exception is an exception to the existence of privilege but has occasionally been treated also as a
 27 waiver of privilege; this is a distinction without a difference. Communications in furtherance of a fraud on the court
 are not protected by privilege. *Id.*

1 Dated: March 8, 2006

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

11 RICOH COMPANY, LTD.,)
12 Plaintiff,) CASE NO. C-03-4669-MJJ (EMC)
13)
14 vs.) [PROPOSED] ORDER DENYING
15 AEROFLEX INCORPORATED, et al.,) DEFENDANTS' *EX PARTE* APPLICATION
16 Defendants) FOR ORDER COMPELLING REMOVAL OF
17) REFERENCES TO PRIVILEGED
18) MATERIAL AND RETURN OF
19) INADVERTENTLY PRODUCED
20) PRIVILEGED MATERIAL
21)
22)
23)
24)
25)
26)
27)
28)

11 Upon consideration of Defendants' *Ex Parte* Application for Order Compelling Removal of
12 References to Privileged Material and Return of Inadvertently Produced Privileged Material, and
13 supporting evidence, Plaintiff's Opposition, and supporting evidence, and any reply and additional
14 argument, and having conducted a hearing on the motions, and the Court being fully advised of the
15 premises, Defendants' *Ex Parte* Application is HEREBY DENIED.

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20 IT IS SO ORDERED.
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22 Dated: _____ MAGISTRATE JUDGE EDWARD M. CHEN
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